No. 87-1889

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., *et al.*,
Appellants,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF WASHINGTON

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

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STATEMENT PURSUANT TO RULE 28.1

The Statement Pursuant to Rule 28.1 may be found at page 139a of the Appendix to the Jurisdictional Statement.

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BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

Amexco/US[1] files this brief in opposition to the three motions to dismiss filed on behalf of WPPSS by the City of Ellensburg, et al. ("Ellensburg Br."), the City of Seattle ("Seattle Br.") and the Columbia Appellees[2] ("Columbia

[1] This and other terms are as defined in the Jurisdictional Statement of Amexco/US.

[2] The Columbia Appellees have not served counsel of record for Amexco/US.

Br.").[3] These motions contain a number of misstatements, the most significant of which are set forth below.

I. The Court Has Appellate Jurisdiction Of This Appeal Under 28 U.S.C. 1257(2)

Supreme Court review of this appeal, which involves the largest municipal bond default in history, is entirely appropriate. WPPSS has attempted at every turn to prevent the bondholders from obtaining a fair hearing on their multibillion dollar claims. WPPSS, working with the Washington legislature, has sought to change the outcome of this and related actions through the passage of the Scienter and Retroactivity Amendments. That legislation removed the negligence cause of action under WSSA and expressly made that change applicable to these lawsuits. Now, WPPSS seeks to preclude review of these obviously unconstitutional Amendments on the basis of empty formalities.

First, this Court has jurisdiction under the fourth criterion of the *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) analysis – – it would seriously erode federal constitutional policy to force Amexco/US to forego trial of its negligence cause of action based upon an unconstitutional amendment to WSSA. Federal policy will be eroded because Amexco/US' constitutional rights will be impaired, no matter what the outcome of the litigation, if it is required to endure the burden and expense of a protracted trial before this Court reviews the constitutionality of the Scienter and Retroactivity Amendments.

WPPSS' arguments that review is inappropriate now would lead to a preposterous result. For example, if a test had been altered to require a higher passing score from women than men, WPPSS' argument, if accepted, would require that a woman's constitutional challenge not be heard until she had studied, albeit much harder than a man would have to, and

[3] In his letter of June 7, 1988, Albert R. Malanca, on behalf of all appellees, stated that additional time to respond to the jurisdictional statements filed in this and the *Haberman* appeal (No. 87-1897) was needed because the appellees intended to file one joint response. In fact, three separate briefs have been filed and some of the appellees have not filed any opposition to the appeal.

taken the test and failed to achieve the higher passing score. Similarly, WPPSS argues that Amexco/US must endure a much more difficult test than it should have to – – undertaking a lengthy and expensive trial on a scienter cause of action rather than trying a simpler negligence cause of action with a greater likelihood of success – – to see if it fails before the constitutionality of the legislation changing the rules may be challenged.

Second, a decision by the Court here will have far-reaching, immediate implications for other WPPSS cases further demonstrating the need to invoke the Court's jurisdiction to protect federal policy. The *WPPSS Federal Action*, in which Amexco/US are members of the plaintiff class, includes WSSA claims. It is estimated that the trial, which is scheduled to begin on September 7, 1988, will last between 6 months and 2 years. Moreover, while the court in the *WPPSS Federal Action* reversed its prior ruling that the Retroactivity Amendment violated principles of separation of powers,[4] it remained "convinced that the actions of the Washington Legislature in this matter were inappropriate and overreaching." *In re Washington Public Power Supply System Sec. Litig.*, MDL No. 551 (W.D. Wash. July 14, 1988) (order addressing defendants' motions for summary judgment) at 55. A second case, *Hoffer v. Washington*, No. 53549-3, certain aspects of which are now pending before the Washington Supreme Court, involves a WSSA claim against Washington State officials over the sale of WPPSS Bonds. Should this Court not accept Amexco/US' appeal, the constitutional rights of plaintiffs in those WPPSS actions will be lost for all practical purposes because of the impracticality of retrial.

Third, no purpose will be served by awaiting completion of a trial because the highest court of the state has ruled on the issue now before the Court. Nothing that will occur in future

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[4] The Columbia Appellees assert that dismissal is warranted because Amexco/US has not raised a separation of powers argument which was initially accepted by the court in the *WPPSS Federal Action*. (Columbia Br. at 14-15). Amexco/US has not raised the issue because separation of powers is a matter of state constitutional law, not federal constitutional law, and thus not reviewable by this Court.

proceedings will explain or alter the Washington Supreme Court's decision. Therefore, in accordance with this Court's "pragmatic approach" to the question of finality, Amexco/US' appeal of the Washington Supreme Court's decision should be accepted for review.

II. The Passage Of The Scienter Amendments Was Not An Attempt To Maintain The Status Quo

The Ellensburg appellees have asserted that prior to 1980, it was understood that the standard of proof under WSSA was fraud and that *Kittilson v. Ford*, 93 Wash. 2d 223, 608 P.2d 264 (1980), changed that standard to negligence. (Ellensburg Br. at 6). Based upon this claim, the Ellensburg appellees assert that scienter amendments were enacted over a concern about this "change". (*Id.* at 7).

The appellees are wrong; the standard of proof under WSSA was negligence until the Scienter Amendment was adopted. As the Washington Supreme Court stated below, Wash. Rev. Code § 21.20.430(7) of WSSA "parallels section 410 of the Uniform Securities Act, which in turn is modeled after section 12(2) of the federal Securities Act of 1933" – – a negligence statute. *Haberman v. Washington Public Power Supply System*, 109 Wash. 2d 107, 125, 744 P.2d 1032, 1048 (1987). In fact, WSSA is to be interpreted more liberally than the Securities Act of 1933. The Washington Supreme Court observed that "while the purpose of federal securities laws is to maintain the integrity of the secondary securities markets and to enforce disclosure, the WSSA is intended to protect investors." *Id.* at 125, 744 P.2d at 1049.

Prior to the decision of the Washington Supreme Court in *Kittilson v. Ford*, WSSA was construed to afford a negligence cause of action. *Shermer v. Baker*, 2 Wash. App. 845, 857-58, 472 P.2d 589, 597 (1970). This is conceded by the Columbia Appellees. (Columbia Br. at 4-5). In *Kittilson*, the Washington Supreme Court again considered the issue and agreed with the *Shermer* court. 93 Wash. 2d at 227, 608 P.2d at 266. In the interim, the anomalous case of *Ludwig v. Mutual Real Estate*

Investors, 18 Wash. App. 33, 567 P.2d 658 (1977), was decided. *Ludwig* construed an already obsolete version of Wash. Rev. Code § 21.20.430, finding that the words "fraud or misrepresentation" were to be given their common law meanings, requiring scienter. 18 Wash. App. at 40-41, 567 P.2d at 661-62. At the time of the *Ludwig* decision, the language it construed had already been excised from the securities law. Act of June 6, 1977, ch. 172 (4), 1977 Wash. Laws, 1st Ex. Sess. 672. Thus, the decision had no prospective effect, and did not establish a viable rule of construction. The result of this series of cases was an uninterrupted application of the negligence standard: following the 1970 *Shermer* ruling, there was no question that the standard was negligence; in 1977, *Ludwig* construed old language *but did not change the rule for future cases;* in 1980, the negligence standard was reaffirmed in *Kittilson.*

The Scienter and Retroactivity Amendments were indeed a reaction to case law – – that of this and related actions and not the *Kittilson* decision.

III. The Scienter And Retroactivity Amendments Violate The Commerce Clause Of The Constitution

First, as an apparent concession that Amexco/US has raised a valid challenge under the Commerce Clause, no mention has been made of Amexco/US' principal argument in support of a Commerce Clause violation – – that the Amendments unconstitutionally shifted liability from the local utilities and their rate payers to the bond purchasers, who like Amexco/US were predominantly from outside the state, and to the New York-based Bond Counsel and underwriters. *See* Jurisdictional Statement at 14-18. Not surprisingly, WPPSS has also made no mention of the two cases which clearly support Amexco/US' claim that this attempt to shift liability violates the Commerce Clause: *New England Power Co. v. New Hampshire,* 455 U.S. 331 (1982) and *Middle South Energy, Inc. v. Arkansas Public Serv. Comm'n,* 772 F.2d 404 (8th Cir. 1985),

cert. denied, 474 U.S. 1102 (1986), discussed at pages 15-17 of the Jurisdictional Statement. These cases are indistinguishable from the facts here.

Second, the Ellensburg appellees argue that the Scienter and Retroactivity Amendments do not regulate or affect interstate commerce citing *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 126 (1978). (Ellensburg Br. at 22-23). In that case, the Court was faced with a divestiture rule requiring petroleum refiners to sell their Maryland gasoline dealerships. No impediment to interstate commerce was found because the required divestiture of service stations did not threaten the flow of gasoline into Maryland, place any additional cost upon the sale of gasoline to Maryland dealers or distinguish in any way between in-state and out-of-state companies. In contrast, here the State of Washington has tried to shift the cost of paying for the $2.2 billion default from Washington residents to those located outside the state. Unlike the *Exxon* case, the shifting of liability for this enormous loss from the interstate sale of bonds clearly affects interstate commerce by purposefully creating a distinction between the liability of those in-state and those located outside of the state.

IV. The Scienter And Retroactivity Amendments Violate The Equal Protection Clause Of The Constitution

First, the Ellensburg appellees improperly argue that the Amendments do not single out Bond Counsel and underwriters, as their coverage by the Amendments has merely been defined away by a clarification of the terms "employee" and "agent". (Ellensburg Br. at 16-17). If followed to its logical conclusion, this argument would mean that, for example, minorities could be excluded from certain benefits by not including them in the definition of "persons". The absurdity of this claim is highlighted by the fact that the Washington attorneys, Houghton Cluck, fall within the definition of "employee" and "agent", whereas New York Bond Counsel, Wood Dawson, which rendered the identical opinion, do not.

Second, WPPSS has ignored the legislative history of the Scienter and Retroactivity Amendments which makes clear that the state's purpose for the discrimination against Bond Counsel and underwriters is not legitimate. Thus, there is no reason to reach the rational relationship step of the applicable test. (Jurisdictional Statement at 20-23). Like the "hippies" in *United States Dep't of Agric. v. Moreno,* 413 U.S. 528 (1973), the Bond Counsel and underwriters have been singled out because they are politically disfavored, being out-of-staters.

Third, the Ellensburg appellees argue that there is no discrimination against non-Washington bond issuers, because the Scienter and Retroactivity Amendments were part of a comprehensive statutory framework to regulate Washington entities. (Ellensburg Br. at 20-21). This claim is belied by the fact that the legislation makes no attempt to regulate Washington issuers, like the Supply System, because they are held liable only if they committed fraud. In contrast, non-Washington issuers are being regulated because they must act in a non-negligent fashion to avoid liability.

V. Amexco/US Has Standing To Raise Equal Protection Clause And Commerce Clause Violations

First, it is undisputed that Amexco/US has standing to assert that the Retroactivity Amendment violates the Due Process Clause of the Constitution. Amexco/US, therefore, has standing to raise Equal Protection Clause and Commerce Clause violations as well. This Court has clearly held that if a party has standing for some purposes, it has standing to raise "any relevant question of law." *Federal Communications Comm'n v. Sanders Bros. Radio Station,* 309 U.S. 470, 477 (1940). *See also Iowa Independent Bankers v. Board of Governors of the Federal Reserve System,* 511 F.2d 1288 (D.C. Cir.), *cert. denied,* 423 U.S. 875 (1975).

Second, appellees contend that Amexco/US has no standing because it does not assert its own rights. In *Director, Office of Workers' Compensation Programs v. Perini North River*

Assoc., 459 U.S. 297, 303-05 (1983), the director's right to raise the right of an injured employee was not questioned where the employee filed a brief in support of the director's appeal. Here, it is undisputed that Wood Dawson has standing to challenge the constitutionality of the Scienter Amendment based on the Equal Protection Clause. Because Wood Dawson raised the issue in the court below and has not only filed a brief in support of Amexco/US' appeal but also cross-appealed,[5] Amexco/US may raise the issue.

VI. The Retroactivity Amendment Violates The Due Process Clause Of The Constitution

First, the Ellensburg appellees argue that Amexco/US has no vested right in its WSSA negligence cause of action because Washington law does not recognize such a vested right. (Ellensburg Br. at 24-25). This is incorrect. Washington law is relevant to the scope and dimensions of the WSSA negligence cause of action; however, whether this cause of action constitutes a constitutionally protected property right is a question of federal constitutional law.

This principle was made clear in this Court's decision in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). There, the Illinois Supreme Court held that a constitutionally protected property right did not exist in a cause of action under the Illinois Fair Employee Practices Act. Despite the state court's ruling, this Court held that the cause of action did constitute a protected property interest under the Fourteenth Amendment. *Id.* at 428.

Second, the Ellensburg appellees assert that Amexco/US received due process, because the Washington legislature's

[5] Wood Dawson has raised precisely the same arguments as Amexco/US, but contends that a different remedy is appropriate for the violations. However, the proper remedy is not to include Wood Dawson within the terms of the Retroactivity and Scienter Amendments because the Amendments state that: "[u]nder no circumstances whatsoever shall this subsection be applied to require purchasers to establish scienter on the part of bond counsels or underwriters." Wash. Rev. Code § 21.20.430(7). Rather, the entire Amendments must be stricken.

agenda was publicly available. (Ellensburg Br. at 25). This totally ignores the fact that Amexco/US, a nonresident, had no elected representative in that legislative body to speak on its behalf at the legislative sessions. No representative of Amexco/US or any other bondholder was invited to address the Washington legislature. Moreover, the legislature had a pecuniary interest in the matter – – both the legislators and their constituents will have to pay for a judgment in favor of Amexco/US in the form of increased utility rates.[6] For these reasons, legislative process was deficient in this instance.

Third, the Ellensburg appellees argue that the passage of the Retroactivity Amendment did not deprive Amexco/US of substantive due process because the legislation was not an attempt to dictate the outcome of this litigation. (Ellensburg Br. at 27-28). This assertion completely ignores the statute's legislative history. Senator Bottinger, the sponsor of the Retroactivity Amendment, stated:

> So the vote here is, in my opinion, shall the underwriting firm that handled that bond issue and their bond counsels pay the bondholders, or shall the rate payers – – the people of the state of Washington. This bill says not the rate payers.

Remarks of Senator Bottinger, *Journal of Senate Debates* 5 (Feb. 16, 1986).

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[6] A portion of the language from *United States Trust Co. v. New Jersey,* 431 U.S. 1 (1977), quoted at page 28 of Amexco/US' Jurisdictional Statement was inadvertently omitted. The full quotation is: "[C]omplete deference to a legislative assessment of reasonableness and necessity is not appropriate [where] the State's self-interest is at stake." *Id.* at 26.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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